Supreme Court, U.S.
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No. 00-1080

IN THE

# Supreme Court of the United States

RANDY BRITTON,

*Petitioner,*

*v.*

SECURITIES AND EXCHANGE COMMISSION, NEW YORK STOCK EXCHANGE, INC., NATIONAL ASSOCIATION OF SECURITIES DEALERS, INC., DONALDSON, LUFKIN & JENRETTE SECURITIES CORPORATION AND JOHN R. WILLSEN,

*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

## BRIEF IN OPPOSITION FOR RESPONDENTS NEW YORK STOCK EXCHANGE, INC. AND JOHN R. WILLSEN

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## QUESTION PRESENTED

Did the lower courts properly decline to exercise subject matter jurisdiction over Petitioner's challenge to inquiries concerning arrest records because he failed to exhaust his administrative remedies?

## STATEMENT PURSUANT TO RULE 29.6

Respondent New York Stock Exchange, Inc. is a corporation organized under the New York Not-For-Profit Corporation Law. It has no corporate parents, and no publicly held company owns ten percent or more of the stock of New York Stock Exchange, Inc.

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Respondents the New York Stock Exchange, Inc. (the "NYSE" or the "Exchange") and John R. Willsen respectfully request that this Court deny the petition filed by Randy Britton ("Mr. Britton" or "Petitioner") for a writ of certiorari to the United States Court of Appeals for the Second Circuit.

## STATEMENT OF THE CASE

In two separate actions commenced in the United States District Court for the Southern District of New York, Mr. Britton sought a declaration that Question 22B of the Form U-4, Uniform Application for Securities Industry Registration and Transfer ("Form U-4") discriminates on the basis of race in violation of Title VII of the Civil Rights Act of 1964.

The district court dismissed all claims against the NYSE and John R. Willsen, an employee of the NYSE. In pertinent part, in the first action ("*Chalsty I*"), the district court determined that it was without subject matter jurisdiction to entertain Mr. Britton's declaratory judgment claims because Mr. Britton had failed to exhaust his administrative remedies with respect to challenges to the Form U-4. In addition, the district court held that the settlement agreement between Mr. Britton and his former employer, Donaldson, Lufkin & Jenrette Securities Corporation ("DLJSC"), of which the NYSE was a third-party beneficiary, was fully enforceable and precluded such claims. In the second action ("*Chalsty II*"), the district court similarly dismissed all claims against the NYSE and Mr. Willsen on the grounds of lack of subject matter jurisdiction and failure to exhaust administrative remedies, as well as on res judicata grounds, holding that the claims that were before the district court in the second action were or could have been litigated in the first action.

Mr. Britton appealed both dismissals in a consolidated appeal to the United States Court of Appeals for the Second Circuit. In a summary order dated June 15, 2000, the Court of Appeals affirmed the decisions of the district court.

The pertinent facts are recited in the brief in opposition to the petition submitted by DLJSC and need not be repeated herein.

## REASONS FOR DENYING THE WRIT

Only two of the petition's four "Questions Presented" relate to the NYSE:

1. Does the non-conviction arrest record inquiry required by 17 C.F.R. § 240.17a-3 comply with Title VII of the Civil Rights Act of 1964 and Public Policy?

2. Are the New York Stock Exchange (NYSE) and the National Association of Securities Dealers (NASD) state actors?

(Pet. at i.)

Review of the first question is not warranted because the district court properly dismissed Petitioner's declaratory judgment actions with respect to arrest record inquiries on the ground that he had failed to exhaust his administrative remedies. The SEC Rules of Practice required Petitioner to petition the Securities and Exchange Commission ("SEC") for rulemaking before pursuing any judicial remedy. *See* Admin. Procedure Act ("APA"), 5 U.S.C. § 553(e) (2000); *see generally* Rules of Practice, 17 C.F.R. § 201.1, *et seq.* (2000).

The second question also does not warrant review. Petitioner appears to contend that the NYSE and NASD are state actors, subjecting them to the constitutional prohibitions against compelled self-incrimination. The Exchange is not a state actor subject to the constraints of the privilege against self-incrimination, and there is no conflict among the courts of appeal on this issue.[1]

Moreover, the Court should not consider these questions because they have not been fairly presented in the petition.

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1. In *United States v. Solomon*, 509 F.2d 863 (2d Cir. 1975), the court of appeals held that "[m]ost of the provisions of the Fifth Amendment, in which the self-incrimination clause is embedded, are incapable of violation by anyone except government in the narrowest sense." 509 F.2d at 867. Thus, the court held that the privilege against self-incrimination did not attach to statements made to the Exchange in the course of an Exchange investigation because the Exchange conducted investigations "in pursuance of its own interests and obligations, not as an agent of the SEC." *Id.* at 869. The *Solomon* court recognized that while the SEC had the authority to oversee such self-regulation, this general oversight did not make the Exchange an arm of the government. *Id.* at 868-69. *Duffield v. Robertson Stephens & Co.*, 144 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998) and *Desiderio v. National Ass'n of Securities Dealers, Inc.*, 191 F.3d 198 (2d Cir. 1999), *cert. denied*, 121 S. Ct. 756 (2001), cited in the petition, did not address the privilege against self-incrimination.

## I.

## THE DISTRICT COURT DID NOT HAVE SUBJECT MATTER JURISDICTION OVER PETITIONER'S CLAIMS BECAUSE HE FAILED TO FOLLOW STATUTORILY MANDATED PROCEDURES FOR CHALLENGING SEC RULES

NYSE has been registered with the SEC as a national securities exchange since 1934 pursuant to the Securities Exchange Act of 1934 ("Exchange Act"). *See* Exchange Act § 6(a)–6(b); 15 U.S.C. § 78f(a)–78f(b) (2000). In furtherance of its obligations under the Exchange Act, the NYSE examines and verifies the qualifications of applicants to become associated with an exchange member or member organization in order to determine if that person meets the standards of training, experience and competence prescribed by its rules. *See* Exchange Act § 6(c)(3)(B); 15 U.S.C. § 78f(c)(3)(B). As a part of the process established to monitor the qualifications of persons working in the securities industry, SEC Rule 17a-3 requires brokers and dealers and members of national securities exchanges to keep certain records regarding each "associated person." For example, they must make and keep current a questionnaire or application for employment executed by each associated person which contains information concerning any arrest or indictment for any felony, or certain misdemeanors, and the disposition thereof. *See* SEC Rule 17a-3(a)(12)(i)(g); 17 C.F.R. § 240.17a-3(a)(12)(i)(g).

Information is also obtained from the Form U-4. The Form U-4 was developed through a joint effort of the SEC, NYSE, NASD and other self-regulatory organizations and was first approved by the SEC in May 1975. The SEC and NYSE are able to verify criminal background information voluntarily supplied by an individual by

submitting his or her fingerprints to the Federal Bureau of Investigation ("FBI"). *See, e.g.*, SEC Rule 17f-2–17f-2(a); 17 C.F.R. § 240.17f-2(a) (2000).

In compliance with these processes mandated in the public interest and to protect investors, DLJSC required Petitioner to complete a Form U-4 and provide fingerprints to the NYSE for submission to the FBI. In *Chalsty I* and *Chalsty II*, Mr. Britton sought a declaration that the procedures for obtaining information about prior arrests discriminate on the basis of race. Mr. Britton did not, however, challenge the NYSE's authority to obtain fingerprints.

The APA requires each federal agency to give an interested person the right to petition for the issuance, amendment or repeal of a rule promulgated by the agency. *See* 5 U.S.C. § 553(e) (2000). The SEC Rules, which permit such a petition to be filed with the Secretary of the SEC, parallel the APA's rulemaking requirements. The rulemaking process followed by the SEC with respect to the rules of registered exchanges has been summarized as follows:

> The Exchange Act provides for the registration of national securities exchanges if their rules are "just and adequate to insure fair dealing and to protect investors," 15 U.S.C. § 78s(b), and directs the SEC to supervise the Exchanges. If plaintiff wishes to influence or change Exchange policy, his remedy is to petition the SEC to exercise its powers under § 19(b) of the Act to recommend changes in Exchange rules, or to alter or amend the rules. The Administrative Procedure Act, § 4(d), 5 U.S.C. § 553(e) provides that "[e]ach

> agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." If plaintiff is "aggrieved" by SEC action relating to Exchange rules, the APA § 10, 5 U.S.C. § 702 gives him the opportunity for judicial review.

*Indep. Investor Protective League v. N.Y. Stock Exch., Inc.*, 367 F. Supp. 1376, 1377 (S.D.N.Y. 1973). Thus, a challenge to the Form U-4 may be made under section 553(e) of the APA and section 19(c) of the Exchange Act by petitioning the SEC for rulemaking. This procedure permits the SEC "to utilize its discretion, apply its expertise, correct its own errors, and handle its business expeditiously." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 616 F.2d 1363, 1370 (5th Cir. 1980).

Both the APA and the Exchange Act provide for judicial review by petition to the court of appeals for the circuit in which the petitioner resides or has his or her principal place of business, or to the Court of Appeals for the District of Columbia, within 60 days after the rulemaking process is completed. *See* 5 U.S.C. § 702-3 (2000); Exchange Act § 25(b)(1); 15 U.S.C. § 78y(b)(1) (2000). The jurisdiction of the court of appeals is exclusive, and the findings of the SEC are conclusive if supported by substantial evidence. *See* Exchange Act § 25; 15 U.S.C. § 78y (2000).

Mr. Britton failed to follow the prescribed process. As a result, the district court properly concluded that it lacked subject matter jurisdiction to consider his declaratory judgment claims.[2]

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2. In addition to failing to exhaust his administrative remedies, Petitioner failed to demonstrate that the NYSE is an "employer" under Title VII of the Civil Rights Act of 1964. Title VII prohibits (Cont'd)

## II.

## PETITIONER'S CLAIMS AGAINST THE EXCHANGE HAVE BEEN RELEASED BY A SETTLEMENT AGREEMENT

In any event, Petitioner's claims against the Exchange were barred by the settlement agreement that Petitioner executed in favor of the Exchange. On March 16, 1992, DLJSC and Petitioner executed the Settlement, Release,

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(Cont'd)
employers from failing or refusing to hire or discharging any individual on the basis of a number of characteristics, including race. *See* 42 U.S.C. § 2000e-2(a) (2000). By its definition, Title VII does not apply to entities that might have employees of their own but are not being sued in their capacity as an employer. Thus, NYSE and Mr. Willsen do not come within the scope of Title VII because Petitioner was never employed by, nor sought employment with, NYSE or Willsen. *See, e.g., Rutherford v. SEC*, 842 F.2d 214 (9th Cir. 1988); *Equal Employment Opportunity Comm'n v. Waterfront Comm'n of N.Y. Harbor*, 665 F. Supp. 197 (S.D.N.Y. 1987); *Lavender-Cabellero v. Dep't of Consumer Affairs*, 458 F. Supp. 213 (S.D.N.Y. 1978).

Petitioner cites *Ass'n of Mexican-American Educators v. California*, 231 F.3d 572 (9th Cir. 2000) ("*AMAE*"), to support his proposition that "Title VII is applicable when the right to employment is adversely affected by third parties, even in the absence of an employer-employee relationship." (Pet. at 13-14.) *AMAE*, however, cannot be read so broadly. In *AMAE*, Title VII was held to apply to the relationship between the State of California and teachers who were subject to state examination requirements that would determine their employability with local school districts. The court held that the state's involvement in the operations of the local school districts, which included the control and funding of local school district budgets by the state, reflected a "peculiar degree of control . . . over local school districts" that warranted a determination that Title VII applied. 231 F.3d at 581.

Covenant Not to Sue, Waiver, and Non-Disclosure Statement pursuant to which DLJSC paid Petitioner $150,000 "[i]n full and complete satisfaction of any and all claims against [DLJSC] and NYSE." (Pet. App. at 34a.) The release Petitioner granted to DLJSC and NYSE was broad and complete, releasing the two "from any and all liability" for claims:

> arising in connection with . . . his application for registration with NYSE, or any and all other acts that may have violated his rights . . . which could arise under any federal, state or local labor, employee benefit or fair employment practice law, or any civil rights law including, but not limited to, *Title VII of the Civil Rights Act of 1964*, the Civil Rights Act of 1866, the Civil Rights Act of 1991, the *U.S. Constitution* . . . or any other local, state or federal claim or any other duty or obligation of any kind or description.

(Pet. App. at 34a–35a (emphasis added).) The district court concluded that the settlement agreement had not been breached and, therefore, refused to order its rescission. (*See* Pet. App. at 5a–6a.) By entering into the settlement agreement, Petitioner forfeited his right to proceed against the NYSE.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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